APPENDIX A

No. 2-93-0444—Filed June 20, 1994

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	No. 92-CF-911
v.	)	
DIANE DREKSLER,	)	Honorable Christopher C. Starck,
Defendant-Appellant.	)	Judge, Presiding.

ORDER

Following a jury trial, the defendant, Diane Dreksler, was convicted of delivery and possession of a controlled substance, specifically, 30 grams or more of a substance containing methaqualone, in violation of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1991, ch. 56 1/2 pars, 1402(a)(9) and 1401(a)(9) (now 720 ILCS 570/402(a)(9) and 720 ILCS 570/401(a)(9) (West 1992))). The trial court sentenced the defendant to eight years' imprisonment. Notice of appeal was timely filed. The defendant makes numerous arguments on appeal. We affirm the conviction, but vacate the sentence and remand for resentencing.

The evidence at trial established that the defendant taught at Maple School in Northbrook, Illinois, for 17 years, and eventually became head of the fine arts department.

According to the defendant, on about ten occasions, Richard Hayes and his wife gave the defendant one or two quaaludes. The defendant testified that prior to the incident in the present case, she never purchased quaaludes from Hayes, and she never sold quaaludes.

Michael Grod, a confidential informant in this case, was an acquaintance of the defendant and her former husband for over 20 years. The defendant and her former husband divorced in 1986. The informant remained an acquaintance of the defendant after the divorce and continued to speak to her. In conversations with the informant, the defendant occasionally mentioned her personal use of quaaludes.

On January 13, 1992, Drug Enforcement Agency (DEA) agents arrested Grod (the informant) for growing and possessing over 100 cannabis plants in his home. After his arrest, he immediately agreed to cooperate with the DEA and to become an informant. The informant decided that the sole focus of his cooperative efforts would be the defendant. According to the informant, he knew that he could set the defendant up because she had already talked about quaaludes for the year prior to the incident in the present case.

Following his agreement to become a DEA informant in January 1992, the informant began calling the defendant several times a month. The defendant testified about the content of these conversations.

According to the defendant, on January 14, 1992, the informant called her and told her that the DEA had broken into his house and confiscated his marijuana plants. Approximately one week later, the informant called again, wanting to talk about his arrest.

According to the defendant, in the beginning of February the informant called her and revealed that because of his arrest, he would have to submit to periodic drug testing and could no longer smoke marijuana. The informant mentioned that he wanted and needed something else to get high on. He asked the defendant to call Hayes to get him some quaaludes.

According to the defendant, two days later, the informant called her and asked if she had spoken to Hayes. The defendant responded in the negative. The informant explained that he and an old friend, "Cass," who was really DEA Agent Kestutes Jodwalis, were growing marijuana at "Cass's" (Agent Jodwalis') house. The informant again requested that the defendant call Hayes to get him some quaaludes.

According to the defendant, in mid-February, the informant called her inquiring whether she had talked to Hayes. The defendant told him that she had talked to Hayes, when in fact she had not. She told him that she had talked to Hayes "so that he would stop bothering [her] about getting him quaaludes."

According to the defendant, the next day the informant left a message for her on her recorder, asking if she had heard from Hayes. He asked her to call him if she has. He said that if she did not call, he would call her soon. According to the defendant, in late February the informant again called her and asked her to call Hayes to find out if he could get anything.

According to the defendant, in early March the informant again called her and asked her if she had spoken with Hayes about getting him the quaaludes. The defendant replied, "I've talked to [Hayes]. If he calls me, then I'll call you. If I hear anything I'll let you know, but I'm

in the process of moving. I can't be bothered with this, and I just don't have anything further to say to you."

According to the defendant, during the second week of March, the informant left approximately three or four messages on her answering machine asking her to call him. During the third week of March, the informant continued to call her.

According to the defendant, during the fourth week of March, the informant became more aggressive. The informant told her that he and his friend, "Cass" had $500. He told her that he did not care what Hayes had or what he could get. He asked the defendant to promise him that when she hung up the phone she would call Hayes and get $500 worth of whatever he had. He also asked her to promise that she would call him back, or he would call her. According to the defendant, in the beginning of April, the informant called her a few more times.

On April 6, 1992, at approximately 2:25 p.m., the informant contacted Agent Jodwalis so the DEA could tape a phone call to the defendant. During the telephone conversation, arrangements were made for the informant and "Cass" to meet with the defendant and exchange quaaludes for money. On the evening of April 6, 1992, the informant and Agent Jodwalis met with the defendant at her home in Highland Park. This meeting was recorded by a device worn by the informant. The defendant made a phone call to discuss when she could pick up the quaaludes from Hayes. Agent Jodwalis gave the defendant $490. The defendant drove to a local food store. Agent Jodwalis and the informant followed her and waited in the grocery store parking lot. The defendant drove to Hayes' home and picked up 27 quaaludes. The defendant then went back to the parking lot and handed Agent Jodwalis a white envelope containing 27 quaaludes and $5

change. When Agent Jodwalis asked the defendant if he would contact her for more quaaludes, the defendant said to go through the informant.

The defendant was not arrested after the April 6 delivery. While she was indicted for the April 6 offense, it was not the subject of the charges in the present case. However, over the defendant's objections, the trial court admitted evidence addressing the April 6 transaction.

On April 7, 1992, at approximately 11:30 a.m., the informant engaged the defendant in another tape-recorded telephone conversation concerning a larger purchase of quaaludes. The informant asked the defendant what larger quantity purchase would have to be made to obtain a "cut" in price. The defendant responded that the informant would have to purchase 1000 quaaludes in order to get a break in price.

On April 8, 1992, the informant called the defendant three times to arrange a purchase of 1000 quaaludes for $16,500. That afternoon Agent Jodwalis arrived at the defendant's home wearing a recording device. The defendant met him at the door. The defendant said that Hayes had dropped off the quaaludes earlier and had told her to frisk him for a wire. The defendant patted down Agent Jodwalis' chest and stomach, but did not find his recording device. The two went down to the basement whereupon the defendant handed Agent Jodwalis a Marshall Field's bag containing approximately 1000 quaaludes, and Agent Jodwalis gave her $16,500. The defendant and Agent Jodwalis went back upstairs. The defendant left the money on her sofa in the basement.

Shortly thereafter, DEA agents entered the defendant's home and arrested her. After the defendant was read her *Miranda* rights, she made statements to the agents, agreed to cooperate, and informed them that her source

was Hayes. While the defendant also allowed the agents to tape-record a telephone call to Hayes, the trial court refused to allow the defense to play this tape at trial. Nor would the trial court permit the defense to introduce evidence surrounding the circumstances that prompted the defendant's statement, *i.e.*, the agents' telling her that she would be charged with a Class X felony if she did not cooperate.

At no time during their dealings with the defendant did the informant or Agent Jodwalis come into contact with any "mule" employed by the defendant, nor did they discover her using any drug code words or a pager. Other than the seized quaaludes, no illegal drugs or drug paraphernalia were found in the defendant's home.

In her defense, the defendant called several character witnesses. The trial court ordered the testimony of three character witnesses stricken, and instructed the jury not to consider that testimony in any way. Of the witnesses (two teachers, a photographer, a lawyer, and an investment banker) whose testimony the court did not strike, each testified that the defendant had an excellent reputation for being a law-abiding citizen.

The defendant relied upon the affirmative defense of entrapment at trial. Following seven and one half hours of deliberations during which the jury sent out several questions indicating confusion over the entrapment defense, the jury returned a verdict of guilty.

On March 19, 1993, the defendant appeared in court represented by new counsel. The court entertained arguments on post-trial motions, and denied the motions. The court sentenced the defendant to eight years' imprisonment. The defendant filed a timely notice of appeal.

The defendant's first argument on appeal is that the State failed to prove beyond a reasonable doubt that she was not entrapped. The defense of entrapment is defined in section 7-12 of the Illinois Criminal Code of 1961 which provides:

> "A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated." Ill. Rev. Stat. 1991, ch. 38, par. 7-12 (now 720 ILCS 5/7-12 (West 1992)).

Once a defendant presents some evidence to raise the issue of entrapment, the State must prove, beyond a reasonable doubt, that the defendant was not entrapped. (*People v. Campbell* (1992), 146 Ill. 2d 363, 375.) Thus, the relevant inquiry is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements essential to the criminal conviction beyond a reasonable doubt. *Campbell*, 146 Ill. 2d at 374.

To support a finding of entrapment, the evidence must disclose improper inducement by the State and a lack of predisposition to commit the crime on the part of the defendant. (*People v. Lambrecht* (1992), 231 Ill. App. 3d 426, 434.) A defendant's predisposition to commit an offense is a crucial element in overcoming an entrapment defense. (*People v. Cross* (1979), 77 Ill. 2d 396, 405.) The courts have considered several factors when determining a defendant's predisposition to commit a drug offense: (1) the defendant's initial reluctance or readiness to commit the offense; (2) the defendant's familiarity with drugs; (3)

her willingness to accommodate the drug user's needs; (4) her willingness to profit from the transaction; (5) whether she has a ready source of drugs; (6) her own prior or current use of illegal drugs; (7) her participation in testing or cutting the drugs; (8) whether she was involved in a course of conduct involving similar offense; and (9) whether she had a prior criminal record. (*Lambrecht*, 231 Ill. App. 3d at 435.) Courts may also consider evidence of a defendant's subsequent activities when a defendant pleads entrapment, if the evidence is relevant not the issue of predisposition. *Tipton*, 78 Ill. 2d at 484.

Viewing the evidence presented to the jury, we find that the jury could have found beyond a reasonable doubt that the defendant was predisposed to commit the charged offenses, and it therefore could have rejected the entrapment defense. The evidence indicated that the defendant was familiar with drugs, she had knowledge of a supplier, she was willing to accommodate one who was desirous of obtaining drugs, she profited from the transaction, and she had used illegal drugs in the past. In addition, there was testimony that the defendant had traded quaaludes for marijuana in the past and that she had grown marijuana in her home. We find that this record is sufficient to sustain the jury's verdict.

The defendant's next argument on appeal is that the trial court erred in precluding the defense from cross-examining the informant, who was a critical witness for the State, about growing marijuana as his primary source of income. During cross-examination of the informant, who was the State's first witness, defense counsel verified that the informant had testified that his occupation was as a fence installer. Defense counsel then proceeded to pose the following question:

> "Is it not a fact, Mr. Grod, that for at least the past 10 to 12 years that [*sic*] your main source of income has been that of a marijuana grower or dealer?"

A sidebar ensued, during which defense counsel indicated that he should be able to question the informant about his occupation, his source of income, and his marijuana growing over the past 10 to 12 years. In response to the trial court's inquiry as to any evidence besides the 104 plants found growing in the informant's home on January 13, 1992, defense counsel stated that the defendant would testify that she had known the informant to grow marijuana as his main source of income for 10 to 12 years. The prosecutor argued that the defendant's statement would be without support and that defense counsel could not perfect the attempted impeachment.

Defense counsel then altered his argument to focus on the need for the cross-examination as proof of the informant's lack of credibility, bias and motive for testifying. The trial court stated that the informant's alleged longtime occupation as a marijuana grower would not impact upon his bias and motive for testifying. Instead, the court stated that the January 13, 1992, growing incident for which the informant was arrested formed the only basis for motive, as that involved the "federal rap" he faced. The court then limited cross-examination to the specific charges against the informer in this case. The trial court sustained the State's objection to the question, the testimony was stricken, and the jury was advised to disregard it.

Later in the cross-examination, defense counsel asked the informant whether he had supplied individuals other than the defendant with marijuana during the past five years. Again, the State objected, and the trial court sustained the objection.

The defendant now argues that her constitutional right to confrontation was violated by the trial court's decision to restrict her cross-examination of the informant. The defendant attacks the trial court's determination on two fronts: first she argues that an accused has a right to cross-examine a witness about his occupation, and secondly, she asserts her right to establish the informant's bias, interest, or motive for testifying.

A defendant has a right to question a witness concerning any matter which goes to explain, modify, or discredit what he testified to on direct examination. *People v. Barr* (1972), 51 Ill. 2d 50,51.

In the present case, since the informant had testified on direct examination that his occupation was as a fence installer, we find that the inquiry into his occupation as a marijuana dealer was permissible for purposes of impeachment. (See *Barr*, 51 Ill. 2d at 51.) Thus, we find that the trial court erred in restricting the defendant's cross-examination of the informant on this matter.

The State argues that the trial court's error was harmless. In *People v. Wilkerson* (1981), 87 Ill. 2d 151, the Illinois Supreme Court stated:

> "The test for harmless constitutional error is whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.) Three approaches for measuring error under *Chapman* have been noted: (1) focusing on the error to determine whether it might have contributed to the conviction [citation]; (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction [citation]; (3) determining whether the evidence is cumulative or merely duplicated properly admitted evidence [citation]." *Wilkerson*, 87 Ill. 2d at 157.

There is nothing in the record to suggest that the outcome of the case would have been any different if defense counsel would have been permitted to pursue cross-examination of the informant regarding his occupation as a marijuana dealer. The informant testified that he had supplied the defendant with marijuana for somewhere between one and five years, that he had helped her grow marijuana in her home because she had no expertise, and that he and the defendant had traded marijuana for quaaludes in the past.

The defendant testified that the informant told her that he had grown marijuana as his main source of income for 15 years. She further testified that he had supplied her with marijuana, through gift or sale, for 20 years. The jury also heard testimony that the informant was arrested for growing marijuana, was approached by the DEA with the opportunity to cooperate in return for consideration during this court case, and signed an agreement to serve as a confidential informant.

All of this testimony assures that the jury was familiar with the informant's marijuana growing and selling over the years, and his potential reason for false testimony against the defendant. It is very unlikely that defense counsel's cross-examination would have revealed anything more damaging to the informant's credibility. There is no indication that the determination would have been different if defense counsel had been permitted to ask the informant if his primary source of income was derived from marijuana sales. In addition, the defendant describes this as a close case, but we disagree. We find that overwhelming evidence supports the defendant's conviction in this case. Finally, the impeachment evidence merely duplicated properly admitted evidence. As discussed above, the record is replete with testimony about the informant's history of growing and selling marijuana.

We find that the trial court's error in restricting the defendant's cross-examination of the informant was harmless beyond a reasonable doubt. See *Wilkerson*, 87 Ill. 2d at 157.

The defendant's next argument on appeal is that she was denied effective assistance of counsel when her counsel injected argument before the jury and solicited testimony from the informant regarding the defendant's previous marijuana possession and use. The defendant filed a motion *in limine*, requesting that evidence of her past use and possession of marijuana be barred. The trial court ruled that evidence of the defendant's possession or use of marijuana would not be permitted, but any evidence of the defendant's sale or distribution of marijuana and the defendant's past use of quaaludes would be admissible.

During his opening statement, defense counsel stated: "You will hear things about [the defendant]. [The defendant] has used marijuana in the past." Later, in his cross-examination of the informant, defense counsel solicited testimony that he had supplied the defendant with marijuana over a period of years.

Based on defense counsel's opening statement and his cross-examination of the informant, and at the urgings of the prosecution, the trial court reversed its previous ruling barring evidence of marijuana use and ruled that any and all evidence relating to the defendant's past use of marijuana would be admissible. The State was then permitted on redirect examination of the informant to explore in great detail the defendant's prior use of marijuana. In addition, the State inquired into how in the years prior to 1987, the defendant's ex-husband had grown marijuana in the defendant's home; the presence of marijuana plants in

the defendant's home for a few months after her husband's departure; and her maintaining those plants.

To establish ineffective assistance of counsel, the defendant must establish that counsel's representation fell below an objective standard of reasonableness (*Strickland v. Washington* (1984), 466 U.S. 668, 688, 80 L. ed. 2d 674, 693, 104 S. Ct. 2052, ___), and that there is a reasonable probability that, were it not for counsel's professional shortcomings, the result of the proceeding would have been different (*Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at ___). Effective assistance of counsel refers to competent, not perfect, representation. (*People v. Ortiz* (1987), 155 Ill. App. 3d 786, 795.) On review, great deference must be given to trial counsel's conduct (*People v. Uselding* (1991), 217 Ill. App. 3d 1063, 1075), and we will not review matters involving the exercise of judgment, discretion, trial tactics, or trial strategy (see *People v. Arnett* (1991), 217 Ill. App. 3d 626, 636). In reviewing counsel's conduct, courts consider the totality of the circumstances, not isolated instances that, with the benefit of hindsight, one can see might have been handled differently. *People v. McNeal* (1987), 160 Ill. App. 3d 796, 804.

The State argues, and we agree, that defense counsel's decision to usher in evidence of the defendant's past marijuana use was trial strategy. Because she was presenting a defense of entrapment, it was important for the defendant to emphasize the bad character of the informant whom she claimed set her up. Much of the evidence that related to the informant's growth, use, and distribution of marijuana, and reflected negatively on his character. In addition, defense counsel was aware that the informant could testify that he engaged in previous drug deal in which he traded with the defendant quaaludes for mari-

juana. Such evidence would be permitted under the trial court's initial ruling on the motion *in limine*, and was, in fact, elicited in the informant's testimony.

Such testimony revealing the defendant's previous marijuana use was permitted even under the ruling *in limine*, counsel's decision to present her use up front, and to use the testimony to discredit the informant, could be considered good trial strategy. Additionally, the defendant's direct testimony included related information, an indication of the continuation of counsel's trial strategy on this point. Defense counsel could have reasonably determined that any prejudice to the defendant resulting from this evidence was outweighed by the damage done to the informant's credibility.

Defense counsel's decision was a tactical one which, in retrospect, proved unsuccessful, but does not demonstrate incompetence. (See *Arnett*, 217 Ill. App. 3d at 636.) Therefore, we find no ineffective assistance of counsel.

The defendant's next argument on appeal is that the trial court erred in ruling that she could not adduce any evidence concerning the circumstances of her post-arrest conduct. Following the completion of the April 8, 1992, transaction with Agent Jodwalis, the defendant was arrested in her home by DEA agents. DEA agents immediately sought the defendant's cooperation. Defense counsel stated during arguments on the pre-trial motion that the supervising DEA agent on the scene advised the defendant that she would be facing Class X charges, mandating a minimum of six years in jail, if she did not cooperate. The defendant agreed to cooperate. She made statements to the agents in which she identified Hayes, her supplier, and further related that Hayes would be coming over to pick up the money. In addition, the defendant phoned

Hayes after the arrest. The agents tape-recorded this telephone call.

These post-arrest events precipitated a number of pre-trial requests by the State and the defense. The defense filed a motion to suppress confession, predicated upon allegation that the defendant's post-arrest statements were involuntary and the product of police coercion, unfulfilled promises, and her distressed state of mind, as well as a failure to comply with Miranda. Following an evidentiary hearing, the trial court denied the defendant's motion.

The State moved to exclude any mention that the defendant was charged with a Class X offense. Defense counsel emphasized that following the arrest, the agents had told the defendant that she was facing a Class X charge if she did not cooperate. The trial court ruled that the defense could not adduce such evidence.

The State also moved *in limine* to preclude the defense from introducing the tape-recording of the post-arrest telephone call between the defendant and Hayes. While recognizing that the recording might help an entrapment defense, the State maintained that the defense could not introduce the recording because it had been suppressed. The recording was suppressed because the State did not introduce any evidence in response to the defendant's pre-trial motion to suppress all tape-recordings.

In considering the pre-trial motions *in limine*, the trial court declared it had "trouble visualizing the relevance of conduct after the arrest." While making *in limine* rulings, the trial court later stated that it did not want evidence introduced regarding the "specifics" of post-arrest conversations.

During direct examination by the State, Agent Jodwalis testified that after he gave the verbal arrest signal on April 8, 1992, members of the arrest team entered the defendant's house and placed her under arrest. Agent Jodwalis testified that he observed *Miranda* rights being read to the defendant on two occasions. Agent Jodwalis testified that after two *Miranda* warnings, the defendant agreed to cooperate and told DEA agents that her source of the quaaludes was Hayes, and that Hayes was going to come by to pick up the money. This was the extent of testimony in the record regarding the defendant's post-arrest conduct.

During Jodwalis' cross-examination, the defendant sought to introduce evidence of the defendant's post-arrest conduct. The State objected. Consistent with its pre-trial remarks, the court ruled that the defense could not present evidence concerning the defendant's conduct after the arrest. Thus, the defendant was precluded from introducing the tape-recording of her post-arrest conversation with Hayes, or evidence that she telephoned Hayes following the arrest. In addition, the trial court's pre-trial rulings prohibited the defendant from introducing evidence regarding statements made by the police that induced the defendant's post-arrest statements which the State introduced into evidence at trial.

The defendant argues that to the extent that she was precluded from eliciting further evidence of the post-arrest activity, she was denied her right to put on a defense. The defendant argues that further evidence of her conduct immediately following her arrest would have assisted the jury in finding her a "native and trusting soul" rather than an "experienced and cavalier drug dealer."

The State argues, and we agree, that the defendant's nervous behavior at the time of her arrest and her

willingness to cooperate with DEA agents at that time do not contribute to showing that she was entrapped in her sale of the quaaludes. The defendant's theory that evidence of her nervous behavior and willingness to cooperate upon arrest would have led the jury to conclude that she was entrapped is unsupported. The defendant's nervous behavior and willingness to cooperate upon arrest are not probative of her lack of predisposition to commit the offense. Therefore, we find that the trial court properly excluded evidence of the defendant's post-arrest behavior.

In addition, we find that the trial court properly excluded evidence regarding statements made by the agents which the defendant claims induced her post-arrest statements. In this case, voluntariness of the defendant's statements was not an issue at trial. Therefore, the statements made by the agents, which may have induced the defendant to make statements or to cooperate, were irrelevant and properly excluded. We find *People v. Melock* (1992), 149 Ill. 2d 423, which was cited by the defendant, distinguishable since voluntariness was at issue in that case.

We also find that the post-arrest tape recording of the conversation between the defendant and her source was properly excluded as irrelevant. We find *People v. Williams* (1985), 109 Ill. 2d 327, which was cited by the defendant, distinguishable since the tape-recordings in *Williams* were of the defendant's own interviews after his arrest, and the officers in that case testified to the content of the interviews at trial. In the present case, the tape-recording was of a post-arrest telephone conversation between the defendant and her source, and the agents did not testify to the content of that conversation. The content of that conversation was irrelevant in this case.

The defendant's next argument on appeal is that the trial court erred in striking the testimony of three of her character witnesses. The defendant presented the testimony of eight character witnesses. Each of these witnesses testified to the defendant's good reputation for being a law-abiding citizen. In five instances, the testimony of the witnesses was allowed to stand, but in three cases the trial court granted the prosecutor's request to strike the testimony. The defendant now argues that her ability to present a defense was greatly impaired by the trial court's action in striking character witness testimony, and requests reversal and a new trial.

The defendant called Robert Kalbfell, a Chicago police officer who had known the defendant for 23 years, as one of her character witnesses. Kalbfell saw the defendant approximately twice a month. He testified that he was familiar with the defendant's reputation in the community where she resided and among her associates and neighbors. Kalbfell testified that the defendant had an excellent reputation for being a law-abiding citizen.

On cross-examination, Kalbfell related that he was familiar with the defendant's reputation because they grew up and lived in the same neighborhood and had a common circle of friends. Kalbfell named the friends, including one who lived in Inverness whom Kalbfell saw a couple of time a month. Kalbfell testified that the circle of friends gather with the defendant at least once a month. Pressed on cross-examination, Kalbfell stated that it was "common knowledge" that the defendant had a reputation for being a law-abiding citizen. Kalbfell observed that one gets a general idea of another's reputation by being with her. The State attempted to get Kalbfell to admit that his testimony about the defendant's reputation only amounted to an opinion. However, Kalbfell responded

it was stronger than an opinion. While Kalbfell admitted that he had never outwardly discussed that the defendant was a law-abiding citizen, he stressed that nobody had ever said anything bad about the defendant.

The State moved to strike Kalbfell's testimony on the grounds that the defense had not laid sufficient foundation for any discussions concerning anything about the defendant's being a law-abiding citizen. Defense counsel responded that, as a practical matter, one must demonstrate good reputation based upon no person's ever having said anything negative about a person's character trait for being a law-abiding citizen. The trial court struck Kalbfell's testimony in its entirety and instructed the jury that they were not to consider it in any way.

Arlene Rosenthal, a housewife and mother of six children, testified that she had known the defendant for about three years through Maple Junior High School. Rosenthal volunteered at the school where the defendant taught. She saw the defendant about once a week for three years. Rosenthal testified that the defendant had an excellent reputation for being a law-abiding citizen in the community where she resided and among her associates and neighbors.

On cross-examination, Rosenthal stated that she based her testimony on conversations with teachers at the school, school board members, and parents. Rosenthal further testified that she had substantial contact with the defendant because she was very interested in art and her daughters were the defendant's students. Rosenthal pointed out that she had discussions with teachers and parents about how the defendant does a wonderful job with the kids. Rosenthal stated that she did not know if conversation of whether the defendant was a law-abiding citizen ever arose, but she emphasized that the defendant

was a good person, an excellent teacher, and wonderful confidant for the children.

On redirect examination, Rosenthal was asked if there had been any conversation with regard to whether the defendant was a law-abiding citizen. She answered that there had not.

The State moved to strike Rosenthal's testimony on grounds of insufficient foundation. The trial court struck the testimony in its entirety and instructed the jury not to consider it in any way.

Finally, Lewis Blond, a teacher at Maple Junior High School, testified that he had know the defendant for the past ten years as a colleague at the school. In fact, the defendant was Blond's supervisor. He had seen the defendant just about ever day for the past ten years. Blond testified that the defendant had a reputation for being a law-abiding citizen within the community where she resided and among her associates and neighbors.

On cross-examination, Blond stated that his knowledge of the defendant's general reputation as a law-abiding citizen stemmed from conversations with other colleagues and parents. He pointed particularly to discussions in the teachers' lounge following the defendant's arrest. Before that time, Blond could no recall the actual subject of the defendant's law-abiding nature coming up in conversations at the school.

The State moved to strike arguing that reputation after the arrest was irrelevant. The trial court, however, noted that Blond's testimony was not limited to reputation after the arrest, and that Blond had participated in conversations after the arrest. However, the next day the trial court struck Blond's testimony in its entirety and instructed the jury not to consider it in any way.

When a defendant raises the defense of entrapment, her character is directly at issue. (*People v. Perez* (1991), 209 Ill. App. 3d 457, 465.) In order to show that her character traits are inconsistent with the commission of the offense charged, the defendant may introduce evidence of her good character and general reputation for the specific character traits which are inconsistent with the commission of the offense. *Perez*, 209 Ill. App. 3d at 465.

"A trial court's ruling regarding competency to testify as a reputation witness is a determination that will not be disturbed absent an abuse of discretion." (*People v. La Fiura* (1981), 93 Ill. App. 3d 1099, 1104.) A reputation witness must be shown to have adequate knowledge of the subject. (*People v. Reeves* (1935), 360 Ill. 55, 65; *People v. Bascomb* (1979), 74 Ill. App. 3d 392, 395.) It is not necessary for a reputation witness to be able to testify that he heard the defendant's reputation being discussed, since "[the defendant's] reputation may be known though never generally discussed." *People v. Dunham* (1931), 344 Ill. 268, 274.

The fact that a witness heard no discussion of the defendant's reputation does not justify the inference that the witness has no basis upon which to testify about the defendant's general reputation. (*People v. Pieper* (1951), 410 Ill. 15, 19.) While actual discussion or conversation regarding the character trait relevant at trial are not mandatory, a witness must show he possessed an awareness of the defendant's reputation because of his association with the defendant's friends and neighbors, not that he merely had a personal opinion on it. *Bascomb*, 74 Ill. App. 3d at 394-95.

Character evidence should be confined to proof of the defendant's general reputation in the community at or prior to the commission of the offense. (*People v. Lucas*

(1992), 151 Ill. 2d 461, 484.) It must not be allowed to cover reputation after the commission of the offense or what was said after the offense with reference to the character of the accused either before or after the offense. *People v. Willy* (1921), 301 Ill. 307, 317-318; *People v. Wright* (1992), 234 Ill. App. 3d 880, 895.

We find that the trial court erred in striking the witnesses' character testimony, since each of them offered a sufficient basis to establish that he or she had adequate knowledge of the defendant's reputation for being a law-abiding citizen. Kalbfell testified that he grew up with the defendant, knew her for 23 years, saw her regularly, had a common circle of friends, and never heard anyone say anything negative about her character. Rosenthal testified that she met with the defendant once a week for three years, had discussions concerning the defendant with teachers, school board members, and fellow parents, and never heard any person say anything about the defendant's not being a law-abiding citizen. Blond testified that he saw the defendant every day for ten years and based his knowledge of the defendant's reputation on discussions with teachers and parents.

On direct examination, each of the witnesses testified that he or she knew that the defendant had a good reputation for being a law-abiding citizen. The fact that the witnesses may not have been able to pinpoint discussions in which the defendant's reputation for being a law-abiding citizen was discussed did not render the testimony without foundation. Specific prior discussions about a defendant's reputation are not required for a character witness to give reputation testimony. (See *Dunham*, 344 Ill. at 274; *Pieper*, 410 Ill. at 19; *Bascomb*, 74 Ill. App. 3d at 294-95.) Here, none of the stricken witnesses indicated that he or she ever had heard anything negative about the

defendant's reputation for being a law-abiding citizen. Each had significant contact with the defendant over a number of years and with various other individuals who also knew the defendant, and, thus, had knowledge of her reputation. Accordingly, we find that the trial court erred in striking the testimony.

Though a portion of Blond's testimony dealt with post-arrest conversations, his knowledge of the defendant reputation was based upon having known her and her close associates for over ten years. Only after being pressed by the State for specific conversations did he refer to post-arrest discussions. Based upon these facts, the general knowledge he had acquired of the defendant's reputation was sufficient. Only the portion of Blond's testimony which was based on conversations following the defendant's arrest was inadmissible and properly denied. See *Willy*, 301 Ill. at 317-18; *Wright*, 234 Ill. App. 3d at 895.

Although we find the trial court erred in striking the witnesses' testimony, we also find that the error was harmless. (See *Wilkerson*, 87 Ill. 2d at 157.) The defendant presented eight character witnesses. Five witnesses' testimony to the defendant's general reputation as a law-abiding citizen was permitted to stand. The jury heard adequate testimony to the defendant's good character. The testimony which was stricken was cumulative.

The defendant next argument on appeal is that the trial court erred in precluding her character witnesses from testifying that she had a good reputation for honesty. During a hearing on pre-trial motion, the defendant indicated that she would be presenting reputation evidence by means of witness testimony. The State represented a ruling from the trial court as to those character traits pertinent to the charged offense. The trial court determined that evidence concerning the defendant's reputation as a

law-abiding citizen would be permitted, but ruled that honesty, integrity, truth, and veracity were not pertinent to an unlawful delivery charge or to an entrapment defense, and that evidence of those traits would not be admitted. The defendant argues that the trial court's decision prevented her from presenting evidence regarding a significant issue in the case, and requests for reversal on that basis.

There exist two circumstances under which evidence of a defendant's reputation for truth and veracity is admissible: first, when it relates to an issue involved in the crime charged, and secondly, when the defendant's reputation for truth and veracity has been attacked as being bad. *People v. Griffith* (1978), 56 Ill. App. 3d 747, 756.

After a careful review of the record in this case, we find neither circumstance present here. Truth and veracity are not related to the crime of unlawful delivery of a controlled substance, and the defendant's reputation for truth and veracity was at no time attacked. Therefore, we find that the trial court correctly rejected the testimony concerning the defendant's reputation for truth and veracity. See *Griffith*, 56 Ill. App. 3d at 756.

Our ruling considers the defendant's argument that her credibility was repeatedly and vigorously attacked by the State. A review of the record, however, discloses only careful cross-examination of the defendant. The State attempted to clarify apparent discrepancies between the defendant's testimony and that of the informant and Agent Jodwalis. In addition, the State cross-examined the defendant about a prior inconsistent statement. At no time during cross-examination did the State attack the defendant's reputation for truth and veracity. Thus, the issue of her honesty did not arise in that manner.

The defendant's next argument on appeal is that the trial court erred in barring her from introducing evidence that she had no prior criminal record. The State argues, and we agree, that the defendant has failed to preserve this issue for appeal. There was no objection made by the defendant at the hearing where the State's motion *in limine* was granted. Furthermore, the defendant failed to address this issue in either her post-trial motion or her supplemental post-trial motion. Failure to make a timely objection and failure to raise alleged error in a post-trial motion result in a waiver of the issue on appeal. *People v. Williams* (1990), 139 Ill. 2d 1, 14.

The defendant's next argument on appeal is that by its handling of the jury's notes during deliberations, the trial court placed undue emphasis on the other-crimes evidence, while diminishing the entrapment defense. On the final day of the trial, the jury began its deliberations at approximately 1:00 p.m. Sometime between 2:00 p.m. and 3:00 p.m., the jury requested a definition of entrapment. After conferring with counsel for both sides, the judge gave the jury the agreed response which was that the jury had an instruction which have the legal definition of entrapment. The jury later responded, "We need it in writing. Please we have all differing meanings." The record does not contain a response to this question. The jury later sent another note saying they needed a dictionary. After conferring with counsel for both sides, the judge gave the jury the agreed response which was : "Regarding the meaning of any words you should rely on the instruction of law and your ordinary experiences in the affairs of life."

Finally, late in the deliberations, the jury inquired: "If [the defendant] was entrapped on April 6 was she also entrapped *[sic]* on April 8? Or do we have to consider both

days as one event?" The judge believed that the jury was confused and that he could not let them flounder. The State asked the judge to restate the other-crimes instruction. Defense counsel strenuously and repeatedly objected to such a procedure on grounds that the court should not single out just one instruction since the jury would give undue weight to that instruction. Defense counsel argued, *inter alia*, that the entrapment instruction should be included in any response. The trial court refused to include an entrapment instruction in the response. Rather, in a written instruction sent to the jury, the trial court basically reiterated the proof of other crimes instruction. The instruction read:

> "The defendant is charged with the conduct which took place on April 8.
>
> The evidence that you heard with respect to conduct of April 6, or other conduct, was received on the issue of defendant's intent, motive, design, knowledge and predisposition and may be considered by you only for that limited purpose.
>
> It is for you to determine whether the defendant was involved in any prior conduct and, if so, what weight should be given to that evidence on the issue of intent, motive, design, knowledge and predisposition.
>
> Please consider this together with *all* of the other instructions during your deliberations."

Defense counsel warned that an instruction singling out proof of other crimes, but not mentioning entrapment, would soon coerce a verdict in the State's favor. Approximately an hour and a half later, the jury returned a verdict of guilty on both counts.

The defendant argues that the court's response directed the jury's attention to the other-crimes evidence, favoring the State and prejudicing her. We disagree.

If a jury asks a specific question on a point of law arising from facts about which there is doubt or confusion, a trial court should respond to the question in an attempt to clarify the confusion. *(People v. Pryor* (1989), 181 Ill. App. 3d 865, 871.) However, a trial court may, in the exercise of its discretion, refrain from answering inquiries of the jury when the instructions given are readily understandable and sufficient to explain the relevant law. *Pryor*, 181 Ill. App. 3d at 871.

During a conference with counsel on this matter, the trial judge expressed his concern over the jury's obvious confusion as to how they should view the events of April 6. Evidence of the April 6 transaction was offered for a limited purpose, and the jury's questions indicated potential misuse of that evidence. The trial judge correctly believed that it was his duty to prevent the jury from further confusion. He determined that a restatement of the instruction on other-crimes evidence, combined with the caution that the jurors must consider all of the instructions, would adequately quell the jury's confusion.

Reiteration of an instruction in response to a jury question has been held appropriate in Illinois. (See *People v. Caballero* (1984), 102 Ill. 2d 23, 42-43, *modified on other grounds* (1989), 126 Ill. 2d 248.) In the present case, the jury received Illinois Pattern Jury Instructions, Criminal, No. 3.14 (__ ed. 19__), regarding evidence of other crimes, which read:

> "Evidence has been received that the defendant has been involved in offenses other than that charged in the indictment.
>
> This evidence has been received on the issues of the defendant's intent, motive, design, knowledge and predisposition and may be considered by you only for that limited purpose.

> It is for you to determine whether the defendant was involved in those offenses and, if so, what weight should be given to this evidence on the issue of intent, motive, design, knowledge and predisposition."

The trial court's response to the jury's questions was nothing ore than a restatement of this instruction and a direction for the jury to consider all instruction in its deliberations. Failure to aid the jury on this question might have encouraged misapplication of the evidence.

The defendant states that the trial court showed favoritism toward the State, because it restated the other-crimes instruction, but refused to restate the entrapment instruction when the jury asked for a definition of entrapment. We disagree. The jury's question about entrapment came early in the deliberations, and the trial judge, in response, referred the jury to the entrapment instruction. Upon receiving the jury question which is at issue here, the trial court expressed concern that after several hours, the jury appeared to be confused. The trial court properly found that it was obvious that the jury needed help to alleviate ongoing confusion and a restatement of the instruction regarding proper use of the April 6 evidence was warranted. The trial court properly reiterated a neutral statement of the law from which no prejudice to the defendant resulted.

The defendant's next argument on appeal is that the cumulative effect of the error on this case deprived her of a fair trial. Having already found that the defendant's earlier arguments were waived, without merit, or harmless error, we find that this claim is also without merit.

The defendant's next argument on appeal is that the trial court violated her right to due process by increasing her punishment because she exercised her constitutional right to a jury trial. Prior to trial, the court conducted a

conference pursuant to Illinois Supreme Court Rule 402 (134 Ill. 2d R. 402). During post-trial hearings, the trial court expounded upon its recollection of the off-the-record 402 conference:

> "Let me tell you what my recollection is of the 402 conference. [Defense counsel] did in fact ask the State if they would reduce it down to something different than the Class X, and they said no, we are not. We are not going to reduce it. We are not going to reduce it from an X. We got her on the X and we going to trial. What we will do is guarantee you six years if you save us—not the cost, but if you save us from going to trial. We will give you guaranteed six if you plead and we will drop the other case. He said to us that his client said she lost everything anyway, she's got nothing to lose, maybe she would win this case."

After the 402 conference and while on the record, the judge stated that he had learned about the defendant's background and a bit about the facts of the case including: the amount of quaaludes charged in this case, that the matter was on tape, that the defendant had been set up by an informant she had known for a great number of years, and that the defendant, if she went to trial, would raise the defense of entrapment. The trial judge indicated that it would accept the plea and impose the minimum sentence of six years based on the facts of the case known to him. The defendant rejected the offer of six years' imprisonment and went to trial. After a jury trial, she was sentenced to eight years' imprisonment. The defendant now argues that her constitutional right to due process was violated because the trial court increased her sentence as punishment for her exercising her right to a jury trial. We disagree.

The cases cited by the defendant do not support her argument. *North Carolina v. Pearce* (1969), 395 U.S. 711,

23L. Ed. 656, 89 S. Ct. 2072, and *People v. Carpenter* (1971), 2 Ill. App. 3d 372, involved retrials in which defendants received harsher sentences following new trials. The new trials had been granted because of constitutional errors in the initial trials. The Supreme Court held that while there is no absolute bar to the imposition of a more severe sentence upon retrial, the reasons for imposing a more severe sentence in such a situation must appear affirmatively in the record. *Pearce*, 395 U.S. at 723-26, 23 L. Ed. 2d at 668-70, 89 S. Ct. at ___.

In *People v. Love* (1985), 139 Ill. App. 3d 104, 116, which was also cited by the defendant, the defendant's sentence was increased without comment after the defendant withdrew his guilty plea and was convicted by a jury. The appellate court found that the increase violated the defendant's right to due process where no justification was found in the record, and the increase was assumed punishment for the defendant's exercise of his right to a jury trial. *Love*, 139 Ill. App. 3d at 116-18.

The instant case is distinguishable from those cited by the defendant. This case does not involve a resentencing. The trial court never sentenced the defendant to six years' imprisonment. It merely indicated that it would be agreeable to a negotiation pursuant to Supreme Court Rule 402, wherein the State would seek six years' imprisonment in exchange for a plea of guilty to the Class X offense. The plea was never entered, as the defendant rejected the offer. At the time the plea proposal was discussed, the trial judge stated that he had been given a bit of background on the case. Following the jury trial, the judge was apprised of all of the evidence, as well as mitigating and aggravating factors, and based upon all of the evidence, he sentenced the defendant to eight years' imprisonment. No comment regarding the difference between

six and eight years' imprisonment was necessary because the defendant was never sentenced to six years' imprisonment.

The defendant also cited *People v. Moriarty* (1962), 25 Ill. 2d 565, and *People v. Young* (1974), 20 Ill. App. 3d 891. These cases are distinguishable in that they both involved statements by the trial court confirming that increased sentences were given because the defendants chose to plead not guilty rather than guilty. (*Moriarty*, 25 Ill. 2d at 566-67; *Young*, 20 Ill. App. 3d at 894-95.) Whether a defendant received a harsher sentence because she demanded a trial must be clearly established by the evidence. (*People v. Perry* (1971), 47 Ill. 2d 402, 408-09.) This record contains no evidence to support the defendant's argument that the judge increased her punishment for exercising her constitutional right to a jury trial.

The defendant's next argument on appeal is that her eight-year sentence is excessive and unfair in light of the eight-month sentence received by Hayes, her supplier. We disagree.

It is generally held that defendants who are similarly situated should not receive grossly disparate sentences. (*People v. King* (1988), 165 Ill. App. 3d 464, 472.) However, the defendant and Hayes cannot be considered similarly situated. For example, Hayes was charged and sentenced in Federal court under a Federal statute, while the defendant was charged and sentenced in State court under a State statute.

In addition, Hayes entered into a negotiated plea agreement, and the defendant exercised her right to a jury trial. Where the defendant receiving the lighter sentence receives the sentence pursuant to a plea agreement, that sentence is no basis for comparison. (*King*, 165 Ill. App. 3d at 472.) Thus, we concluded that Hayes' eight-month

sentence cannot be used as a basis for comparison. See *King*, 165, Ill. App. 3d at 472-73.

The defendant's final argument on appeal is that her sentence was based upon improper considerations. Sentencing is a matter within the trial court's discretion, and a reviewing court will not disturb a sentencing order unless it represents an abuse of that discretion. (*People v. Harrison* (1987), 156 Ill. App. 3d 39, 42.) However, when a sentencing court improperly considers a factor in aggravation and it cannot be determined how much weight that factor was accorded, a new sentencing hearing is required. (*People v. Conover* (1981), 84 Ill. 2d 400, 405.) A factor necessarily implicit in a crime should not be used as an aggravating factor when sentencing for that crime. *Conover*, 84 Ill. 2d at 404.

In the present case, the trial court considered, among the aggravating factors, that the defendant received compensation for committing offense. As this court stated in *Harrison*, "compensation is a factor implicit in most deliveries of a controlled substance and that factor thus falls within the prohibition established in *Conover*." (156 Ill. App. 3d at 42.) We conclude that the trial court erred in considering the compensation received as an aggravating factor in sentencing the defendant.

In addition, the record indicated that the trial court may have considered societal harm caused by drugs in sentencing the defendant. The harm caused by delivery of controlled substances is inherent in the offense. (See *People v. Atwood* (1990), 193 Ill. App. 3d 580, 592-93.) Nothing in the record here indicated that the conduct of the defendant had any more propensity to cause them harm than that which was inherent in the offense. (*Atwood*, 193 Ill. App. 3d at 593.) Accordingly, we hold that any consideration of this factor in aggravation also was error.

The State argues that we need not remand for resentencing because the weight placed on the improper factors as so insignificant that it did not lead to a greater sentence. (*People v. Bourke* (1983), 96 Ill. 2d 327, 332.) However, we cannot determine from the record that the weight placed on the improperly considered aggravating factors was so insignificant that it did not lead to a greater sentence. The cause must therefore be remanded for resentencing. *Bourke*, 96 Ill. 2d at 332.

For all of the foregoing reasons, we affirm the conviction, but vacate the sentence of the circuit court of Lake County and remand for resentencing.

Affirmed in part; vacated in part and remanded for resentencing.

GEIGER, J. with WOODWARD and COLWELL, JJ., concurring.

APPENDIX B

77506

ILLINOIS SUPREME COURT
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October 6, 1994

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No. 77506 - People State of Illinois, respondent, v. Diane Dreksler, petitioner, Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this court will issue to the appellate court on October 28, 1994.